Supreme Court, U.S.
FILED
JUL 20 1995
OFFICE OF THE CLERK

No. 95 20

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

SYLVIA C. CIMERMANCIC,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

APPENDIX TO

PETITION FOR WRIT OF CERTIORARI

to the
Texas Court of Appeals
For the Thirteenth District

JOSEPH A. CONNORS III
Texas Bar No. 04705400
212 W. Nolana Loop
McAllen, Texas 78502-5838
(210) 687-8217
(210) 687-8230 FAX

ATTORNEY FOR PETITIONER

June 30, 1995

CR4.SCC

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NUMBERS 13-93-291-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI

==========

SYLVIA C. CIMERMANCIC, Appellant,

v.

THE STATE OF TEXAS, Appellee.

==========

On appeal from the County Court at Law Number One of Cameron County, Texas.

==========

O P I N I O N

Before Justices G. Hinojosa, F. Hinojosa and Yañez

Opinion by Justice F. Hinojosa

Appellant was charged by information with unlawfully carrying a weapon. She waived a jury trial and entered a "not guilty" plea. The trial court found her guilty and fined her $300. We affirm.

Appellant raises nine points of error, some with subpoints. All these points essentially

raise the same challenge to the sufficiency of the evidence. Appellant complains that the State failed to correctly prove her gender.

The information alleged that "Sylvia Carrancho Cimermancic, the Defendant, did then and there unlawfully, intentionally and knowingly carry on and about ***his*** person a weapon, to wit: handgun, against the peace and dignity of the State." (Emphasis ours). At trial, appellant testified that she carried a gun on the date alleged. The uncontradicted evidence showed that appellant was a female. Appellant asserted at trial, and now asserts on appeal, that as the evidence shows she was female, the State failed to prove the "his person" allegation in the information. Appellant raises no other sufficiency challenge.

Twenty-four years ago, the Court of Criminal Appeals addressed a similar complaint in *Newell v. State*, 461 S.W.2d 403 (Tex. Crim. App. 1970). The Court stated:

Lastly, it is contended that a

> variance exists in the allegation in the indictment that refers to the complaining witness as "him" and the proof that shows the complaining witness to be a female. The name Nancy Ann Stevens appears in the indictment some seven times.
>
> There is no showing that appellant was misled by the allegations or proof in any way. No material variance or injury is shown.

Id. at 404. The *Newell* Court then referred to the provision in the then-existing Penal Code which provided that the pronoun "he" includes females as well as males. *Id.*

The current Penal Code provides, "A person commits an offense if he intentionally, knowingly, or recklessly carries on or about his person a handgun, illegal knife, or club." TEX. PENAL CODE ANN. §46.02(A) (Vernon 1994). For purposes of construing its terms, the Penal Code itself refers the reader to certain Government Code sections. TEX. PENAL CODE ANN. §1.05 (Vernon 1994). One of those referenced Government Code sections is §311.012. TEX. GOV'T CODE ANN. §311.012 (Vernon 1988). Section 311.012(c) provides, "Words of one gender include the other

gender."

As the information is drawn in the words of the statute, we find that the information's reference to "his" includes the feminine gender, and therefore proof that appellant was a female is not at variance with the allegations in the information. There simply is no variance. As all of appellant's points are premised on the existence of a variance, all of appellant's points are without merit and are overruled.

The judgement of the trial court is affirmed.

/s/ Federico G. Hinojosa, Jr.
FEDERICO G. HINOJOSA, JR.
Justice

Opinion ordered not published.
TEX. R. APP. P. 90.

Opinion delivered and
filed this the 22nd day
of December, 1994.

COURT OF APPEALS

Thirteenth Judicial District

Corpus Christi, Texas

Below is the JUDGMENT in the numbered cause set out herein to be Filed and Entered in the Minutes of the Court of Appeals, Thirteenth Judicial District of Texas, at Corpus Christi, as of the 22nd day of December, 1994. If this Judgement does not conform to the opinion handed down by the Court in this cause, any party may file a motion for Correction of Judgment with the Clerk of this Court.

CAUSE NO. 13-93-291-CR

(Tr. Ct. No. 92-CRR-0007107-A)

SYLVIA CARRANCHO CIMERMANCIC, Appellant,

v.

THE STATE OF TEXAS, Appellee.

on appeal to this Court from Cameron County, Texas.

* * * * * * * * *

J U D G M E N T

On appeal from the County Court at Law No. 1 of Cameron County, Texas, from a judgment dated May 25, 1993. Opinion by Justice Federico G. Hinojosa, Jr. Opinion ordered not published. Tex. R. App. P. 90.

THIS CAUSE was submitted to the Court on January 5, 1994, on oral argument, the record, and

briefs. These having been examined and fully considered, it is the opinion of the Court that there was no error in the judgment of the court below, and said judgment is hereby AFFIRMED against appellant, SYLVIA CARRANCHO CIMERMANCIC.

It is further ordered that this decision be certified below for observance.

* * * * * * * * *

CATHY WILBORN, CLERK

INFORMATION

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS:

RICHARD R. RODRIGUEZ Assistant Criminal District Attorney of Cameron County, Texas, on behalf of the State of Texas, presents in the COUNTY COURT AT LAW of Cameron County, Texas, at the NOVEMBER Term, 1992, of said Court, that on or about the 17th day of SEPTEMBER, A.D. 1992, and before the making and filing of this information, in Cameron County, Texas, SYLVIA CARRANCHO CIMERMANCIC the Defendant, did then and there unlawfully, intentionally and knowingly carry on and about his person a weapon, to-wit HANDGUN, against the peace and dignity of the State.

LUIS V. SAENZ
CAMERON COUNTY CRIMINAL DISTRICT ATTORNEY

/s/
Assistant Criminal District Attorney
Cameron County, Texas

PLEA OF NOT GUILTY * TRIAL BY COURT

NO. 92-CCR-0007107-A

IN THE COUNTY COURT AT LAW

OF

CAMERON COUNTY, TEXAS

THE STATE OF TEXAS

VS.

SYLVIA CARRANCHO CIMERMANCIC

On this the 25TH day of MAY, 1993. the above numbered and entitled cause was regularly reached and called for trial, when came the State of Texas, by her Criminal District Attorney, and the Defendant SYLVIA CARRANCHO CIMERMANCIC, appeared in person and by his/her attorney J. CONNORS, thereupon the Criminal District Attorney announced ready for trial, and the Defendant, through his/her counsel, also announced ready for trial, and the Defendant in person and in open court pleaded NOT GUILTY to the charge of UNLAWFUL CARRYING OF WEAPONS as alleged in the information; the said plea is by

the Court received and now entered of record in the minutes of the court as the plea herein of said Defendant; thereupon, and the Defendant through his/her counsel, and the Criminal District Attorney announced in open court that they, and each of them, agreed in writing to waive a jury in this cause and to submit this cause to the Court, and the Court having consented to the waiver of a jury herein, and the Court, after having heard the information read, the Defendant pleas thereto, and after having heard all the evidence for the State and the Defendant and argument of counsel, is of the opinion and so finds, that the Defendant is guilty of the offense of UNLAWFUL CARRYING OW WEAPONS, which occurred on the 17TH day of SEPTEMBER, 1992.

IT IS THEREFORE, ORDERED, ADJUDGED, AND DECREED by the Court that on this the 25TH day of MAY 1993, the said Defendant SYLVIA CARRANCHO CIMERMANCIC, is guilty of the offense of UNLAWFUL CARRYING OW WEAPONS as charged in the

information in this cause, and the Court having heard evidence on the question of punishment and argument of counsel thereon fixed the punishment by payment of a Fine and/or Court Costs in the amount of $544.00 payable within OCTOBER 25, 1993 and ordered defendant's WEAPON TO BE FORFEITED TO THE STATE, COUNSEL FOR DEFENSE GAVE NOTICE OF APPEAL. APPEAL BOND SET AT $500.00 CASH, IN THE EVENT DEF. DOES NOT APPEAL, DEF. HAS 60 DAYS TO PAY COURT COSTS AND 5 MONTHS FROM THIS DATE TO PAY FINE.

/s/ Everardo Garcia
JUDGE PRESIDING

Cause No. 92-CCR-7107-A

State of Texas	§	In the County Court
	§	
vs.	§	at Law Number One of
	§	
Sylvia Carrancho Cimermancic	§	Cameron County, Texas

Statement of Facts

Volume Three of Three Volumes

(This volume contains: Motion for New Trial and Exhibits to the Trial before the Court on July 9, 1993 and May 25, 1993 respectively.)

A P P E A R A N C E S :

Hon. Elena Salinas
Assistant District Attorney
974 East Harrison
Brownsville, Texas 78520

Counsel for State of Texas

Hon. Joseph A. Connors, III
Attorney at Law
212 West Nolana Loop
McAllen, Texas 78502-5838

REPORTED BY:
Julie M. Cantu, C.S.R.
Official Court Reporter
Cameron County Courthouse
Brownsville, Texas 78520

(On the 9th day of July, 1993, the foregoing numbered and styled cause came on for Motion for New Trial in County Court at Law Number One of Cameron County, Texas, Honorable Everardo Garcia, Judge presiding. The following is a transcript of that hearing.)

July 9, 1993

10:30 A.M.

THE COURT: Okay. 92-CCR-7107-A, State versus Sylvia Carrancho Cimermancic. This is the Defendant's Motion for New Trial?

MR. CONNORS: Yes, Your Honor. The defendant is present, and Joe Connors represents her. We are ready.

John Olson is here for the State. He is ready, he said.

THE COURT: All right. I will hear your motion, counsel.

MR. CONNORS: Thank you, Judge. Yesterday morning, we had filed Defendant's Law Memo on the Motion for new trial. It is a total of nine pages long. Did you have an opportunity

to read that, Your Honor?

THE COURT: No, I haven't.

MR. CONNORS: You need to do that. That is the whole issue, I think, if we could stop a minute and let you do that.

THE COURT: All right.

MR. CONNORS: Is the Court ready, Your Honor? As I drove down here this morning--

THE COURT: All right.

MR. CONNORS: During the trial, to the bench trial, Mr. Abel, if you will recall, had said he had seen my client at the beach in a swimming suit, and my client was a she, not a he, and then we brought my client's son, and the son also said, "This was my mother," but you really never made a finding one way or the other whether my client was a female or a male. If I could get you to make such a finding, then we can move on to the next issue of this surplusage and the other things that I have listed I think towards the end of the motion where I sort of anticipated the State's arguments and put them

in here for you and tried to say they weren't so good and I should win. But could you make that factual finding in case we had to go to the higher court and they would know I wasn't standing here with a gentleman?

THE COURT: The Court finds that Sylvia Carrancho Cimermancic is a female ---

MR. CONNORS: All right. Judge, thank you.

THE COURT: Female person.

MR. CONNORS: Female person, thank you, Judge.

The bottom line seems to be, once the State has pled what they pled in their lawsuit, that the weapon was carried on or about his person, we all knew they couldn't prove it, and that is why I came sort of and tried the lawsuit, and the question is going to be that his person, a surplusage thing, and I am trying to say that it is not. It is a statutory requirement to have the gun on or about, and then it can be his or her person.

We know that his in the statute is a generic his or her. If it is just said the person and he had the gun, would that mean that Mr. Olson could be convicted because it is on or about a person?

See, the person, no. The legislature decided it ought to be on the person of the defendant, and therefore, they say his obviously or hers in the statute, but the State chose not to plead it as hers, and obviously it is a technical mistake, but they couldn't prove what they had pled, or it seems to me you need to find my client not guilty, and maybe the State in the future in female gun cases will plead it properly.

That is their mistake, and I get to rely on their mistake, because you have got to find beyond a reasonable doubt what you can not find.

I will let Mr. Olson talk to you now.

MR. OLSON: Very briefly, Your Honor, I would like you to take judicial notice of Section 1.05 of the Penal Code, which is

titled, "Construction of the Code." The very first sentence says, "The rule that a penal statute is to be strictly construed does not apply to this code."

I then ask you to take judicial notice of the statute with regard to the offense in question, which was unlawfully carrying a weapon, which is Section 46.02, and it indicated that a person commits an offense if he intentionally and knowingly or recklessly carries on or about his person a handgun, illegal knife or club.

My response in addition to some of the comments that Mr. --- Mr. Connors said, he is correct. We do believe that the Government Code does address this favorable to our --- our point, and that is back at page eight.

THE COURT: Eight?

MR. OLSON: Where he cited a case indicating that a matter in the particular case of Newell versus State, that there was a complaint here, that the complaining witness was

referred to as him, and the proof shows that the complaining witness was a female and that there was no showing that the appellant was misled by allegations or proof in any way.

We would suggest that counsel has not shown this Court how his client was misled by the State alleging his, and more particularly, that we are --- our information did track the statute, and now granted the better way of practice would have been for the proper noun to have been in the female her, but in this particular situation, it wasn't. We feel that there was no harm caused to the defendant, and as I recall, if I remember correctly from the prosecutor who handled the case, the defendant took the stand and admitted to having carried the weapon in the case in chief, and so we would submit to the Court that with regard to the matter of whether or not there was harmful error to the degree that --- that this case should be granted a new trial, we don't think counsel has carried that burden, and that if the appellate

court feels that that was the case, she is not going to get a new trial. She is going to get an absolute acquittal.

I think that we --- that the appellate court would be the proper forum to consider that. The Court was here and is --- was aware of the evidence and otherwise found the defendant guilty.

We would ask that the Court would overrule the Defendant's Motion for New Trial.

Thank You.

MR. CONNORS: Very briefly, Judge. The idea of no harm, if the State forgets to prove one of its allegations that it is required to prove, that we are not harmed, the Ortega case which actually arose in a trial here in this Court before Raul Gonzalez, presiding Judge got reversed and acquittal ordered by the Court of Criminal Appeals in 1984, because in that particular case, it was a credit card fraud.

I think I can do this briefly. It was a credit card fraud. He used somebody else's

credit card, Sear's here locally, and the indictment of the District Attorney said he used that --- or the client, Ortega, used that credit card with the intent to obtain services, and I think the word was and goods or something, but it got to choose or something like that, and that "and" in there, if that is the way you read it, when you get to the Jury Charge and prepared the Jury Charge, and the paragraph that says, "Now, if you find beyond a reasonable doubt ---" and they left that "and" in there. If they put "or," the Court points out, Mr. Ortega would not have been acquitted, but having left the "and" in there, there was only one thing that the jury would do, because there is no evidence that Mr. Ortega when presenting his card and getting his shoes from Sear's intended to get any services, and that is what the Court held.

By tying themselves down to that "and" in the Jury Charge, they --- the jury could only come back with a not guilty, and to do anything else was a violation of due process and the law,

and it was contrary to the law and the evidence, and in the Ortega case, they point out while Corpus Christi Court of Appeals had talked about, well, it was sort of a harmless error, well, they said, "When you get into the sufficiency business, it can't be harmless error, because if the State didn't prove exactly what it was required to prove to get the guilty from the jury through the Jury Charge, then the only verdict is not guilty."

So, there is a harm there. The State didn't meet its burden of proof, and so that is in the opinion, I think Judge Campbell, said on rehearing. So, I hope that does away with the no harm situation, but then you look at me and say, "Well, this was a bench trial. We didn't have a jury. We didn't have the application paragraph."

Well, that of a Jury Charge, that is why I put in here hopefully to help all of us this morning on page six, I listed in paragraph seven, the Charged Offense, and you can

obviously read it, and which you have done I think you have told us this morning, and paragraph eight is the Conviction Offense.

What did my client get convicted of? Well, when you signed what I call a judgment, I am not sure what you all call it down here, but the thing that said she was guilty, there is your language, Your Honor, and you found her guilty of the offense of unlawful carrying O-W, which I think you mean O-F, weapons as charged in the information in this cause.

So, you found her to be a man, it seems to me, or you found that to be surplusage, and they didn't have to prove it.

That is the only two things you could find, and this idea of surplusage, the argument, I don't know if --- and sometimes I think it is so simple, I am being stupid making today's argument, but I have run it by three lawyers, and we all --- I am the fourth one. We all think that once the State pleads its lawsuit, they have an obligation beyond a reasonable

doubt from the U.S. Constitution, the Texas Constitution and our statutes, if they are going to get a guilty and it is going to be sustained, I mean, this Court is going to keep it after a Motion for New Trial, then the State has got to prove beyond a reasonable doubt exactly what they allege, and this takes us to the other area that counsel addressed this morning, that the Government Code somehow magically helps him out, helps the State out, and here is why it does not help the State out.

The Government Code says, "When in construing statutes of the State, will take a his ---" it is more general than this, but will take a his and will make it into it or a her. Okay. That is what we are looking at in the statutes.

I find no legislative enactment which says, "When we are looking at indictments or informations, we will magically know that his equals hers and its, and they are interchangeable."

There is no such thing in our law. What we have is an indictment or information filed in the courthouse and coming to prove it beyond a reasonable doubt, Mr. State Prosecutor expects to get a not guilty, because that is the law, and therefore the Government, while it tells all of us that 46.02(a), when it uses his, his person in there, we know that it means his person and her person, and that is why I pointed out earlier they could have pled it better.

They might have even asked to amend it after pleading the lawsuit better, but once we got started in the trial, they got stuck, and they had to prove this lady beside me was a man, and they couldn't do that.

So, I will be quiet and await the Honorable Court's ruling.

THE COURT: Thank you. I don't reach either of your arguments. I think his or hers goes to identity. I think the defendant was identified, and your Motion for New Trial is denied.

MR. CONNORS: I brought you an order, Your Honor.

THE COURT: Okay.

MR. CONNORS: I will get you to sign that. I will get it filed and a transcript will be finished and sent on up yonder to Corpus.

THE COURT: All right.

MR. CONNORS: I don't know. Thank you. May I be excused, Your Honor?

THE COURT: Yes, sir.

(Hearing concluded.)

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CAUSE NO. 92-CCR-7107-A

THE STATE OF TEXAS § IN COUNTY COURT AT LAW #1

VS. § OF

SYLVIA CIMERMANCIC § CAMERON COUNTY, TEXAS

DEFENDANT'S FIRST MOTION FOR NEW TRIAL

The above defendant moves for a new trial, which this court has jurisdiction to grant, Ex parte Drewery, 677 S.W.2d 533 (Tex.Cr.App.1984), for the following reasons:

1) The evidence is insufficient to support the judgment of conviction since

a) V.T.C.A. Penal Code, Section 46.02 (a) reads:"A person commits an offense if he intentionally, knowingly, or recklessly carries on or about his person a handgun, illegal knife, or club."

b) This case's information read in part: "Sylvia Carrancho Cimermancic the Defendant, did then and there unlawfully, intentionally and knowingly carry on and about his person a weapon, to-wit: HANDGUN...."

c) The uncontroverted evidence in this case is that

defendant is a female and could not "carry on or about his person".... as charged.

d) "The definition of a term in this code applies to each grammatical variation of the term." V.T.C.A. Penal Code, Section 1.07(b).

e) The Code of Criminal Procedure has no provision like V.T.C.A. Penal Code, Section 1.07(b).

f) Where the evidence is insufficient to support the fact finder's finding of guilt, the court can grant a new trial and enter an acquittal.

2) In Sullivan v. Louisiana, ___ U.S. ___, 53 CrL 2171 (No. 92-5129 decided June 1, 1993), the Court said (footnote omitted):

> The Sixth Amendment provides that "(i)n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...." In Duncan v. Louisiana, 391 U.S. 145, 149 (1968), we found this right to trial by jury in serious criminal cases to be "fundamental to the American scheme of

justice," and therefore applicable in state proceedings. The right includes, of course, as its most important element, the right to have the jury rather than the judge, reach the requisite finding of "guilty." See Sparf and Hansen v. United States, 156 U.S. 51, 105-106 (1895). Thus, although a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the State, no matter how overwhelming the evidence. Ibid. See also United States v. Martin Linen Supply Co., 430 U.S. 564, 572-573 (1977); Carpenters v. United States, 330 U.S. 395, 410 (1947).

What the factfinder must determine to return a verdict of guilty is prescribed by the Due Process Clause. The prosecution bears the burden of proving all elements of the offense charged, see, e.g., Patterson v. New York, 432 U.S. 197, 210 (1977); Leland v. Oregon, 343 U.S. 790, 795 (1952), and must persuade the factfinder "beyond a reasonable doubt" of the facts necessary to

> establish each of those elements, see, e.g., In re Winship, 397 U.S. 358, 364 (1970); Cool v. United States, 409 U.S. 100, 104 (1972) (per curiam). This beyond-a-reasonable-doubt requirement, which was adhered to by virtually all common-law jurisdictions, applies in state as well as federal proceedings. Winship, supra.
>
> It is self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. It would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty, and then leave it up to the judge to determine (as Winship requires) whether he is guilty beyond a reasonable doubt. Our per curiam opinion in Cage, which we accept as controlling, held that an instruction of the sort given here does not produce such a verdict. Petitioner's Sixth Amendment right to jury trial was therefore denied.

3). Thus, the trial court should grant a new trial and order acquittal herein, since the

State failed to prove the crime and all its factual elements as charged in the information in the above case.

Respectfully submitted by
Defendant's attorney,

/s/ Joseph A. Connors III
JOSEPH A. CONNORS III
Texas Bar No. 04705400
McAllen, Texas 78502-5838
(210) 687-8217
(210) 687-8230 FAX

CERTIFICATE OF SERVICE

I, Joseph A. Connors III, certify that I had delivered or mailed a copy of the foregoing to the office of all attorneys of record on this the 17th day of June, 1993.

/s/ J.A. Connors III
J. A. Connors III

BEST AVAILABLE COPY

CAUSE NO. 92-CCR-7107-A

THE STATE OF TEXAS § IN COUNTY COURT AT LAW #1

VS. § OF

SYLVIA CIMERMANCIC § CAMERON COUNTY, TEXAS

ORDER

Came on to be heard the foregoing. It is ordered by the Court that said Defendant's First Motion for New Trial is hereby set for July 9, 1993 at 10:30 A.M.

Signed June 23, 1993.

/s/ Everardo Garcia
JUDGE PRESIDING

ORDER SETTING HEARING

It is ordered by the Court that (1) the Defendant's First Motion For New Trial is hereby set for hearing before this Court on the 9th day of July, 1993 at 10:30 A.M.; and (2) the Court's Clerk shall promptly notify opposing counsel.

Signed June 23, 1993.

/s/ Everardo Garcia
JUDGE PRESIDING

CAUSE NO. 92-CCR-7107-A

THE STATE OF TEXAS § IN COUNTY COURT AT LAW #1

VS. § OF

SYLVIA CIMERMANCIC § CAMERON COUNTY, TEXAS

ORDER

Came on to be heard the Defendant's First Motion for New Trial. It is ordered by the Court that said Defendant's First Motion for New Trial is hereby denied.

Signed July 9, 1993.

/s/ Everardo Garcia
JUDGE PRESIDING

CAUSE NO. 92-CCR-7107-A

THE STATE OF TEXAS § IN COUNTY COURT AT LAW #1

VS. § OF

SYLVIA CIMERMANCIC § CAMERON COUNTY, TEXAS

DEFENSE'S LAW MEMO ON NEW TRIAL MOTION

The above defendant files this law memo concerning the pending new trial motion.

1. Question:

The question for review is whether the allegation of "his" person in the instant information is merely surplusage or descriptive of that which is legally essential to the validity of the indictment. See Wray v. State, 711 S.W.2d 631, 633 (Tex.Cr.App. 1986)[acquittal]; Franklin v. State, 659 S.W.2d 831, 833 (Tex.Cr.App. 1983)[acquittal]; Windham v. State, 638 S.W.2d 486, 487 (Tex.Cr.App. 1982)[acquittal]; Weaver v. State, 551 S.W.2d 419 (Tex.Cr.App. 1977)[Ruger conviction reversed]; Seiffert v. State, 501 S.W.2d 124 (Tex.Cr.App. 1973)[judgment of trial court reversed for fatal variance]; and Hoover v.

State, 736 S.W.2d 158 (Tex.App.--Houston [14th Dist.] 1987, pet. ref'd)[acquittal]. See also Ortega v. State, 668 S.W.2d 701 (Tex.Cr.App. 1984) (On Rehearing)[acquittal].

In the instant case, idem sonams is inapplicable. Grant v. State, 568 S.W.2d 353 (Tex.Cr.App. 1978)[acquittal since fatal variance of allegation of the complainant's name as Mary Harrington and proof the name was Marion Harrington]; Cox v. State, 608 S.W.2d 219 (Tex.Cr.App. 1980)[affirmance since names are idem sonams].

Herein, the allegation "his person" is descriptive of that which is statutorily and legally essential to charge the offense under V.T.C.A. Penal Code § 46.02(a). The State, being bound by the allegations in the information, was bound to prove beyond a reasonable doubt the offense in the manner alleged in the information and all its essential allegations. Seiffert, 501 S.W.2d at 126-127; Leal v. State, 730 S.W.2d 72, 74 (Tex.App--

Corpus Christi 1987, no pet.) and cases cited therein. The State could not prove its allegation of his person, for defendant is a female not a male. The evidence failed to show defendant carried the handgun on or about his person as alleged. A variance between the allegata and the probata, if fatal, renders the evidence insufficient to sustain a conviction. Seiffert, 501 S.W.2d at 126 and 128. Thus, the judgment of conviction herein must be reversed for insufficient evidence and an acquittal ordered. Otherwise, a guilty finding would be deemed contrary to the law and the evidence. Ortega, 668 S.W.2d at 707.

2. Answer in Short:

Before or during the bench trial herein, no amendment of the information was requested or made with leave of the court and under its direction. Thus, it is relevant whether the information alleged "his person" instead of "her person" for such matter, whether of form or substance, could have been physically amended

and corrected upon the prosecution's express motion made timely before trial or after the trial on the merits commenced if the defendant did not object to such trial amendment. Articles 27.11, 28.10 and 28.11, V.A.C.C.P.; see Ward v. State, 829 S.W.2d 787 (Tex.Cr.App. 1992); Brown v. State, 828 S.W.2d 762 (Tex.Cr.App. 1991); Oliver v. State, 646 S.W.2d 242, 244-246 (Tex.Cr.App. 1983). The lack of a proper amendment to the information prior to conviction prohibits the trial court from declaring as surplusage the statutory generic element of his. "His" is not factually generic to her once "his" was pled in the information. By pleading the statutory "his person" and not properly amending same before trial or conviction, the State was required to prove "his person" beyond a reasonable doubt. Article 2.01, V.A.C.C.P.; V.T.C.A. Penal Code § 46.02(a). That was an impossible burden of proof which the State freely accepted. The applicable fact of defendant's sexuality prohibits the

requisite conviction finding of "his person" for on the record evidence the above defendant is a "she person, not a he person".

With the State being bound to prove all the legally essential statutory allegations of "his person" in the information to obtain a conviction, defendant's conviction cannot stand for the variance between the proof and the pled allegations, which are legally essential to the validity of the information. Acquittal must result, whether defendant's trial was by jury or court, like in Wray v. State, 711 S.W.2d 631 (Tex.Cr.App. 1986); Ortega v. State, 668 S.W.2d 701 (Tex.Cr.App 1984) (On Rehearing); Franklin v. State, 659 S.W.2d 831, 833-834 (Tex.Cr.App. 1983); Windham v. State, 638 S.W.2d 486 (Tex.Cr.App. 1982); Weaver v. State, 551 S.W.2d 419 (Tex.Cr.App. 1977)[Ruger-Luger case]; Seiffert v. State, 501 S.W.2d 124 (Tex.Cr.App. 1973).

Such evidentiary insufficiency may not be harmless, for if there is proof failure of that

required for conviction, constitutional due process demands the defendant be acquitted. Ortega, 668 S.W.2d 703 n. 6.

3. Appellate Review Standard:

In reviewing the sufficiency of the evidence, the court looks at all the evidence in the light most favorable to the prosecution and determines whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 2788-89, 61 L.Ed.2d 560 (1979); Geesa v. State, 820 S.W.2d 154, 156-161 (Tex.Cr.App. 1991); Matson v. State, 819 S.W.2d 839, 843 (Tex.Cr.App. 1991); Hunt v. State, 737 S.W.2d 4, 5 (Tex.App.--Corpus Christi 1987, no pet.); Solis v. State, 673 S.W.2d 270, 273 (Tex.App.--Corpus Christi 1984), affirmed, 718 S.W.2d 282 (Tex.Cr. App. 1986). The trier of fact is the sole judge of the credibility of the witnesses and the weight to be given their testimony and may believe or disbelieve all or any part of any

witness' testimony. Williams v. State, 692 S.W.2d 671, 676 (Tex.Cr.App. 1984); Andrade v. State, 662 S.W.2d 446 (Tex.App.--Corpus Christi 1983, pet. ref'd).

4. State's Trial Burden of Proof:

"The constitutionally required burden of proof of criminal cases 'is that the State establish all elements of the offense beyond a reasonable doubt.'" Geesa, 820 S.W.2d at 156. See Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

V.T.C.A. Penal Code § 2.01 reads:

> All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that he has been arrested, confined, or indicted for, or otherwise charged with, the offense gives rise to no inference of guilt at his trial.

5. Essential Elements:

V.T.C.A. Penal Code § 1.07(a)(13) reads:

> "Element of offense" means:
> (A) the forbidden conduct;
> (B) the required

culpability;
(C) any required result; and
(D) the negation of any exception to the offense.

6. Statutory Offense:

V.T.C.A. Penal Code § 46.02 reads:

> (a) A person commits an offense if he intentionally, knowingly, or recklessly carries on or about his person a handgun, illegal knife, or club.
>
> (b) Except as provided in Subsection (c), an offense under this section is a Class A misdemeanor.
>
> (c) An offense under this section is a felony of the third degree if it occurs on any premises licensed or issued a permit by this state for the sale or service of alcoholic beverages.

7. Charged Offense:

This case's information in part read:

> RICHARD R. RODRIGUEZ Assistant Criminal District Attorney of Cameron County, Texas, on behalf of the State of Texas, presents in the COUNTY COURT AT LAW of Cameron County, Texas, at the NOVEMBER Term, 1992, of said Court, that on or

about the 17th day of SEPTEMBER, A.D. 1992, and before the making and filing of this information, in Cameron County, Texas, S Y L V I A C A R R A N C H O CIMERMANCIC the Defendant , did then and there unlawfully, intentionally and knowingly carry on and about his person a weapon, to-wit: HANDGUN, against the peace and dignity of the State.

8. Conviction Offense:

This case's judgment in part read:

"... after having heard the information read, the Defendant pleas thereto, and after having heard all the evidence for the State and the Defendant and argument of counsel, is of the opinion and so finds, that the Defendant is guilty of the offense of UNLAWFUL CARRYING OF WEAPONS, which occurred on the 17TH day of SEPTEMBER, 1992.

IT IS THEREFORE, ORDERED, ADJUDGED, AND DECREED by the Court that on this the 25TH day of MAY 1993, the said Defendant S Y L V I A C A R R A N C H O CIMERMANCIC, is guilty of the offense of UNLAWFUL CARRYING OW (sic) WEAPONS as charged in the information in this cause, ..."

9. Sufficiency Challenge:

The above defendant's sufficiency challenge is threefold, contrary to that well known adage:

> "When you have the facts, argue the facts; when you have the law--argue the law--if you have neither the facts or the law, pound on the table and recite the constitution."

Solis v. State, 673 S.W.2d 270, 275 (Tex.App.--Corpus Christi 1984), affirmed, 718 S.W.2d 282 (Tex.Cr.App. 1986).

10. Constitutional Due Process:

Federal and State Constitutional due process have been violated herein, for the judicial finding of guilt beyond a reasonable doubt cannot be sustained for no rational trier of facts could have found the alleged essential elements of the charged statutory crime beyond a reasonable doubt.

11. Facts:

The record is uncontroverted that defendant is a female. By its verdict, the court, as the trier of fact, apparently chose to disbelieve

all the evidence that defendant was a she not a he. The evidence is insufficient to support the judgment of conviction as charged.

12. Law:

Everything should be stated in an information or indictment which is necessary to be proved. Articles 21.03 and 21.23, V.A.C.C.P.; Bocanegra v. State, 552 S.W.2d 130, 132-133 (Tex.Cr.App. 1977). Although the factual scenario or legislative intent sometimes requires greater particularity, ordinarily a charging instrument is sufficient if it alleges the offense in the language of the statute. Id. at 132 n. 2; Haecker v. State, 571 S.W.2d 920, 921 (Tex.Cr.App. 1978).

13. State's Cases Distinguished:

"His person" is a statutory element of the conduct proscribed by V.T.C.A. Penal Code § 46.02(a). Of course, there is no statute explaining how to construe the phrase "his person" in the information, although it is clear that in statutes "Words of one gender include

the other genders." V.T.C.A. Government Code § 311.012(c). However, once the statutory element of "his person" is alleged as part of the charging instrument, that is unlike the "the" clerical error in Wright v. State, 729 S.W.2d 123, 125 (Tex.App.--Beaumont 1987, pet. ref'd) and unlike the alleged "him" reference to the female complaining witness in Newell v. State, 461 S.W.2d 403, 404 (Tex.Cr.App. 1970). There, the court affirmed the trial court's judgment, after saying, id. at 404 (footnote omitted):

> Lastly, it is contended that a variance exists in the allegation in the indictment that refers to the complaining witness as "him" and the proof that shows the complaining witness to be a female. The name Nancy Ann Stevens appears in the indictment some seven times.
>
> There is no showing that appellant was misled by the allegations or proof in any way. No material variance or injury is shown.

14. Conclusion:

Without pounding on the court's table, defendant asserts her due process rights to

acquittal for the facts and law demonstrate the proof fails to support the material allegation that Sylvia Carrancho Cimermancic had on or about his person a weapon, to-wit: Handgun. Possession of a handgun in Texas is not per se unlawful. V.T.C.A. Penal Code, Chapter 46. Such possession only is unlawful if "on or about the person of the accused". Since the State failed to prove but pled what could not anatomically nor physically be proved as true beyond a reasonable doubt, an acquittal must be entered herein.

Respectfully submitted
by Defendant's Attorney,

/s/ Joseph A. Connors III
JOSEPH A. CONNORS III
Texas Bar No. 04705400
212 W. Nolana Loop
McAllen, Texas 78502-5838
(210) 687-8217
(210) 687-8230 FAX

CERTIFICATE OF SERVICE

I, Joseph A. Connors III, certify that I had delivered or mailed a copy of the foregoing to the office of Luis Saenz, Criminal District Attorney, Cameron County, Texas, the State's attorney of record on this the 8th day of July, 1993.

/s/ Joseph A. Connors III
JOSEPH A. CONNORS III